UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOTPOINT DIVISION OF GENERAL ELECTRIC COMPANY, a New York corporation, Appellant, vs. CHARLES D. McCARTY, as Trustee in Bankruptcy for THE LUSK CORPORATION, et al., Appellee.	No. 21812

APPELLEE'S BRIEF

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INDEX

TABLE OF AUTHORITIES CITED

STATEMENT OF THE CASE

We believe that a chronological statement of the case will assist the Court and for this reason appellant's statement of the case is supplemented as follows. References to the transcript will be referred to as "Tr." plus the page number, and unless otherwise specified refer to Volume I of the transcript.

Following in chronological order are the filings and matters which are deemed material for purposes of this appeal:

October 28, 1965 - Involuntary petition under Chapter X, as to The Lusk Corporation, filed by three creditors (Tr. 4).

October 28, 1965 - Reference order endorsed on the involuntary petition by Judge Walsh, referring matters to the Referee in Bankruptcy as Special Master (Tr. 4).

November 4, 1965 - Voluntary petition filed under Chapter X as to The Lusk Corporation and five subsidiary corporations (Tr. 81).

November 5, 1965 - Order approving voluntary petition as to The Lusk Corporation and its named subsidiaries (Tr. 86).

November 5, 1965 - Order appointing A.C. Simon Trustee (Tr. 88).

November 5, 1965 - Answer of The Lusk Corporation to

the involuntary petition (Tr. 19).

November 5, 1965 - Motion of General Electric Company to dismiss the involuntary petition (Tr. 24).

November 5, 1965 - Answer of General Electric Company, as creditor, to the involuntary petition (Tr. 26).

December 6, 1965 - Motion of A.C. Simon, as Trustee, to intervene in cause B-5696 (Tr. 45).

December 6, 1965 - Motion of A.C. Simon, as Trustee, for an order approving the involuntary petition (Tr. 46).

December 6, 1965 - Motion of A.C. Simon, as Trustee, to consolidate cause B-5696 (the involuntary petition) with cause B-5720 (the voluntary petition) (Tr. 48).

December 6, 1965 - Motion of petioning creditors on involuntary petition for an order approving involuntary petition (Tr. 33).

December 8, 1965 - Objection of General Electric Company to consolidation of causes B-5696 and B-5720 (Tr. 104).

January 3, 1966 - Answer of First Federal Savings and Loan Associaticn of Phoenix, as creditor, to involuntary petition (Tr. 49).

January 3, 1966 - Answer of First Federal Savings and Loan Association of Phoenix, as creditor, to voluntary petition (Tr. 106).

January 4, 1966 - Hearing on the retention of A.C. Simon as Trustee pursuant to Sec. 161 of the Bankruptcy Act (Tr. 110).

March 24, 1966 - Motion of petitioning creditors to amend petition to add additional creditors as petitioners (Tr. 55).

June 15, 1966 - Order granting motion of petitioning creditors to amend involuntary petition (Tr. 67).

December 15, 1966 - Report of Special Master on pending proceedings (Tr. 115).

January 19, 1967 - Motion of petitioning creditors to modify the order approving the voluntary petition and asserting an answer under Sec. 144 of the Bankruptcy Act (Tr. 128).

January 23, 1967 - Motion of General Electric Company to dismiss the involuntary petition, and objections of General Electric Company to findings of the Special Master numbered 9 and 14 and to conclusions of law of the Special Master numbered VII and XIV (Tr. 130).

January 23, 1967 - Minute entry adopting the report of the Special Master, appointing the Trustee, and directing that the Special Master set pending matters for hearing (Tr. 149).

According to the report of the Special Master

(Tr. 116-117), the voluntary petition was presented to the Judge for consideration without notice to the petioning creditors who had previously filed the involuntary petition, by a group of attorneys for parties in interest, including the attorney for the appellant herein. The Referee in Bankruptcy was also present at the time the petition was presented to the Judge for approval. At that time the Judge was given the undertaking of counsel that if the petition were to be approved by the Court such approval would not prejudice the rights of the petitioners under the involuntary petition, and the voluntary petition was approved with this reservation by the Court. There has never been any objection or exception to this recital in the report of the Special Master.

The motion of General Electric Company to dismiss, the answer of General Electric Company, and the answers filed by First Federal Savings and Loan Association of Phoenix were excluded from consideration by the Special Master, who recommended that these matters be set for hearing after the approval of the involuntary petition (Tr. 126-127).

As pointed out above, these findings were adopted by the Court in the minute entry of January 23, 1967 (Tr. 149). The involuntary petition was approved and the

Special Master was instructed to proceed with hearings on the motion to dismiss and answer of General Electric Company and any other answers which had been properly filed or which would be properly filed.

July 2, 1965, The Lusk Corporation mortgaged to General Electric Company a portion of its assets to secure a debt to General Electric Company in the amount of $1,500,000. Finding number 9 of the Special Master (Tr. 122). This finding was subject to a motion to strike filed by General Electric Company (Tr.130). The basis for this motion is obscure in the light of the fact that the motion to dismiss filed by General Electric Company (Tr. 24) contains an allegation of substantially the same facts in its first paragraph. The significance of the dates of the petitions herein is readily apparent. The mortgage was given approximately four days less than four months prior to the filing of the involuntary petition and approximately three days more than four months prior to the filing of the voluntary petition. It would seem fairly evident that the voluntary petition was filed in an effort to put this transfer beyond the reach of a trustee. This conclusions seems inescapable in the light of the answer filed by the debtor to the involuntary petition, wherein it readily admits the necessity of reorganization and the fact of its inability to pay its debts.

The statement of fact embodied in Specification of Error I(c), page 9 of appellant's brief, is totally unsupported in the record. Appellant departs from the record in making this factual statement.

APPELLEE'S PROPOSITIONS OF LAW

1. All parties whose interests would be affected by a reversal on appeal must be made parties to the appeal.

2. Where an answer has been filed by a creditor pursuant to Sec. 137 of the Bankruptcy Act, the prior approval of a voluntary petition is not conclusive and the question of approval remains such until final determination of the issues raised by the answer pursuant to Sec. 144 of the Bankruptcy Act.

3. A creditor is without standing to appeal from an order of approval entered under Sec. 142 of the Bankruptcy Act.

4. A creditor is without standing to appeal from an order approving a Chapter X petition entered under Sec. 143 of the Bankruptcy Act unless the creditors, debtor, indenture trustees and stockholders have been given notice of hearing as provided in Sec. 145, and the issues have been finally determined.

5. An interlocutory order of approval of a

voluntary petition under Chapter X pursuant to Sec. 141 of the Bankruptcy Act is without prejudice to an involuntary petition previously filed against the same debtor until final determination of issues raised in the answers of creditors and others filed pursuant to Sec. 144 of the Bankruptcy Act.

6. The party asserting a position in a controversy designed to procure a ruling by the court and which does, in fact, lead to such ruling, cannot thereafter be heard to assert an inconsistent position where the rights of other parties not given an opportunity to be heard will be prejudiced.

Argument on Proposition of Law No. 1

The rule stated in appellee's Proposition of Law No. 1 is a simple corollary to the proposition that no court has jurisdiction to determine the rights of a party who is not before the court. The real meat of the appeal here is the order approving the involuntary petition since all of the other matters appealed from are orders in furtherance of the order approving the involuntary petition. The petition was filed by three petitioning creditors who procured the relief sought and appellant would now have the court reverse the case so as to deny relief to the petitioners without naming the petitioners as appellees herein.

The rule stated in Proposition of Law No. 1 is textually supported in the following texts:

4 Am.Jur. 2d p.772, Sec. 278. "All parties in favor of whom judgment was rendered and who would be affected by its reversal must be made appellees or defendants in error."

4 C.J.S. p.860, Sec. 398. "All parties whose interests will be affected by a reversal or modification of the judgment or decree below, as well as all interested coparties of the appellant or plaintiff in error who are not made coappellants or coplaintiffs in error, must be made appellees or respondents in error."

88 A.L.R. 420. "There is no dissent from the proposition that an adverse party, within the meaning of a statute requiring notice of appeal to be served on one who falls within that category in order to give the reviewing court jurisdiction to hear the appeal, is a party to the action whose interests in the subject matter of the action, it appears from the record, might subsequently be adversely affected by, or in the event of, a modification or reversal of the judgment appealed from."

We have not been able to find any federal case which is particularly helpful. Most of the federal cases arise under the failure to join a codefendant on appeal where

judgment went against both defendants below under the prior federal procedure requiring a summons and severance. However, the rule receives some left-handed support in the annotation at 50 L.Ed. 723, where it points out that, "parties whose legal interests will not be affected by the success or failure of the appellate proceedings need not join therein."

It is respectfully submitted that this Court is without jurisdiction to reverse the order approving the petition of the petitioning creditors where the petitioners have not been brought before this Court as parties to the appeal.

Argument on Proposition of Law No. 2

Pursuant to Sec. 141 of the Bankruptcy Act, the Judge, on being handed a voluntary petition under Chapter X, is required to examine the petition to determine if it complies with the requirements of Chapter X. If it does so and it appears on the face of the petition that it was filed in good faith, it becomes the duty of the Judge to approve the petition. There is no requirement whatsoever for notice, and the creditors and others are relegated to the relief afforded them by Secs. 137 and 144 of the Act, which permit the filing of an answer by a creditor at any time prior to the time fixed for the hearing under Sec. 161 of the Act. In this case an answer was filed by First

Federal Savings and Loan Association of Phoenix generally controverting the allegations of the voluntary petition and specifically controverting the good faith of the filing (Tr. 106). In addition, prior to the report of the Special Master the petitioning creditors filed a motion for the approval of the involuntary petition embodying an answer under Sec. 144 of the Act. This answer was accepted by the Special Master, who included it in his recommendation for a further hearing on the matter (Tr. 33 and Tr. 127). The Trustee had moved for the approval of the involuntary petition December 8, 1965 (Tr. 46). The Trustee is not authorized by the law to file an answer.

If appellant's argument is accepted and carried to its conclusion it would mean that notwithstanding the duty of the court to inquire into the issues raised by the answers of creditors under Sec. 144 and the motions for approval, the creditors' petition must be dismissed. This, of course, is nonsense. The issue of the good faith of the voluntary petition remained before the court after the approval of the voluntary petition and will remain until the answers have been disposed of. Actually, in this case there is a strong likelihood of a finding of bad faith with respect to the filing of the voluntary petition in the light of the mandate of Sec. 146(4)

which provides that a petition shall be deemed to have been filed not in good faith if a prior proceeding is pending which would serve best the interests of creditors and stockholders. If, upon the final determination of the issues as required by the Judge, the Judge should conclude that the voluntary petition was not filed in good faith, he would be required to dismiss the petition pursuant to Sec. 144, which, if appellant's position were adopted, would leave all petitions dismissed and the matter lying in a state of unbelievable chaos.

It is respectfully submitted that there is no merit in the suggestion that the failure of anyone to appeal the approval of the voluntary petition created any prejudice to the right of any creditor to appear at the hearing provided for in Sec. 144 of the Bankruptcy Act and controvert the good faith of the petition. A creditor or trustee is not a party to such approval and is without standing to appeal. The fact that the order of approval of a voluntary petition is not conclusive and that the final approval may be required to merit a hearing under Sec. 144 and a second approval is pointed out by the Supreme Court in Note to Duggan v. Sansberry, 327 U.S. 499 at 506, 90 L.Ed. 809, 66 Sup.Ct. 657. (Note 11)

Argument on Proposition of Law No. 3

Admittedly there is some room for conjecture as to whether the approval of the involuntary petition was an approval pursuant to Sec. 142 of the Act or Sec. 143 of the Act. It is our point in arguing Propositions of Law Nos. 3 and 4 to show that it makes no difference whether the approval was made pursuant to Sec. 142 or Sec. 143 unless there was a hearing under Sec. 143 of the Act, with notice to the debtor, creditors, stockholders and indenture trustees as required by Sec. 145, so that a determination under Sec. 143 could become "final" as that term is used in Sec. 145 of the Act. No such notice was given in this case and accordingly if, in fact, the approval was under Sec. 143 of the Act, it was not final within the meaning of Sec. 145. There can be no question that this was the express intent of both the Special Master and the Judge who, in their findings and order with respect to the approval of the involuntary petition, specifically reserved for determination under Sec. 144 the issues raised by the motion of General Electric Company to dismiss and the issues raised by all answers.

Sec. 142 provides that if the debtor files a non-controversial answer it is the duty of the court to approve the involuntary petition if it complies with

Chapter X and appears to have been filed in good faith. We would like to urge the Court to avoid as unnecessary the issue as to whether the answer filed by the debtor herein was a noncontroversial answer envisioned by Sec. 142 of the Act. We intend to develop the proposition that it makes no difference whether the approval was made pursuant to Sec. 142 or Sec. 143 as far as the rights of creditors were concerned. Whether or not the answer was a noncontroversial answer may be of considerable importance in subsequent proceedings herein and we do not believe that the Court should make any determination because such a determination is wholly unnecessary.

There is some divergence between the cases and the texts with respect to what may be considered to be a noncontroversial answer. Assuming arguendo in support of Proposition of Law No. 2 that the Special Master and Court treated the answer as a noncontroversial answer under Sec. 142, it was the duty of the Judge to approve the involuntary petition. There is no provision whatsoever for creditor participation in this determination by the Judge. In precisely the same manner that a creditor may pursue his remedy upon the approval of a voluntary petition, any creditor who believes himself to be aggrieved by the approval of an involuntary petition may file an answer

pursuant to Sec. 137 of the Act and have a hearing on his answer as provided in Sec. 144. A creditor or trustee is not a party to such approval and has no standing to appeal from the order of the Court. The statute makes it mandatory for the Judge to approve the petition if it complies with the Act and was filed in good faith, and the creditor may thereafter controvert if he wishes. The creditor first becomes a party to the proceedings by filing an answer under Sec. 137 and until his answer has been disposed of there is nothing for him to appeal from. It is respectfully submitted that the appellant is and was no party to the action of the Court if taken pursuant to Sec. 142 of the Act and that there was pending on the date of the order appealed from the issues raised by the answer and motion of General Electric Company. There had been no ruling at the time of this appeal on any matter in which General Electric Company was a party. See, also, Note 12 to Duggan v. Sansberry, 327 U.S. 499, 90 L.Ed. 809, 66 Sup.Ct. 657.

Argument on Proposition of Law No. 4

Again we would like to urge the Court to avoid the question of whether or not the answer of the debtor was a noncontroversial answer. It is not necessary to the decision on this appeal and that issue may become important in the future developments of this case.

Assuming arguendo that the action of the Special Master and Judge in approving the involuntary petition was made pursuant to Sec. 143 of the Act, again the creditors of the company are no party to that action of the Court unless specifically made so by notice to the debtor, creditors, indenture trustees and stockholders pursuant to Sec. 145 of the Act. No such notice was given. In the case of a controversial answer it is the duty of the Court to resolve that controversy between the petitioning creditors and the answering debtor. This hearing as between petitioning creditors and the debtor may be summary, as pointed out in Duggan v. Sansberry, 327 U.S. 499 at 507, 90 L.Ed. 809, 66 Sup.Ct. 657. It is true that the creditors can be brought into the hearing at that time upon notice under Sec. 145 of the Act. This, however, was not done. This notice not having been given, the creditor is in precisely the same position that he is in had the answer been noncontroversial. He is no party to the action of the Court in approving the involuntary petition and becomes a party in the matter of the validity of the petition by filing an answer pursuant to Sec. 137 and taking the matter to trial under Sec. 144. See Note 12 to Duggan v. Sansberry, 327 U.S. 499 at 507, 90 L.Ed. 809, 66 Sup.Ct. 657.

There can be no question that if the approval was in fact under Sec. 143 of the Act it was not a final determination as that term is used in Sec. 145 since no notice was given and since both the Special Master and the District Judge specifically reserved for hearing and determination the issues raised by any answers theretofore or thereafter filed under Sec. 137 of the Act.

Professor John Gerdes, in his article, Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act, 52 Harvard Law Review 1 at p.8, points out that the only sensible interpretation of the term "final determination" as used in Sec. 145 of the Act is a determination of the issues raised by whatever answers are filed under Sec. 137 of the Act and taken to trial under Sec. 144. Here, again, the appellant seeks to appeal from an order of the District Court to which it was no party, where its plain remedy was the filing of an answer, which it did file and which at the time of this appeal had not been determined.

Appellant seems to suggest at page 15, second paragraph, of the opening brief, that the Court is under some duty to hear a controverting creditor's answer before approval of a petition. The Court has no such duty. The obvious course for the Court is to wait for the time to

answer to expire pursuant to Sec. 137 and have one hearing on all answers. This is the procedure recommended by the writers. 6 Collier on Bankruptcy (14th Ed) p. 1017; John Gerdes, 52 Harvard Law Review 1 at pp. 7, 8. See, also, Notes 11 and 12 to Duggan v. Sansberry, 327 U.S. 499, 90 L.Ed. 809, 66 Sup.Ct. 657.

Argument on Proposition of Law No. 5

We will confess a total inability to see what comfort appellant finds in Moore v. Linahan, 117 F.2d 140, and Hudson & Manhattan R.R. v. Stichman, 229 F.2d 616, cited with such frequency in appellant's brief. The dicta in both cases (neither case involving a situation in which two Chapter X petitions had been filed as to the same debtor) strongly support the position that the voluntary petition was improperly filed and if anything in the case ever was moot it was the voluntary petition.

It is a strong temptation to suggest to the Court that the inhibition contained in Sec. 126 as to the filing of a Chapter X petition where another Chapter X petition is pending is jurisdictional in nature. However, we make no such argument and urge that the Court avoid this jurisdictional question because it is not now squarely presented to the Court and it will never be presented unless and until there is a final approval of the

voluntary petition after a hearing under Sec. 144 of the Act. Thus far there has been only the ex parte approval provided for in Sec. 141 of the Act, which, as the Supreme Court pointed out in Duggan v. Sansberry, 327 U.S. 499, 90 L.Ed. 809, 66 Sup.Ct. 657, is inconclusive and to which, as we have pointed out in the argument on Proposition of Law No. 2, the creditors and the trustee are not parties.

Judge Hand, in his opinion in the Linahan case, pointed out the possibility of the use of a voluntary petition to "short circuit" an involuntary petition. See the discussion at 117 Fed.2d at p.143 under headnotes 2,3. This situation, which Judge Hand at that early time had difficulty in envisioning, has materialized in this case. The voluntary petition was filed. From the cold record we have no trouble in gleaning an intent to promote a $1,500,000 preference which may be voidable into an unassailable position by the lapse of four months. This pinpoints the danger of a jurisdictional discussion as to the meaning of Sec. 126 where the question is not squarely presented to the Court.

If on the Sec. 144 hearing on the voluntary petition the Court finds that it was filed in bad faith and dismisses it, that will be the end of it. Only if the Court finally approves it will the jurisdictional question be presented. It is respectfully submitted that there is not a word in

either of the cases so heavily relied upon by appellant supporting appellant's position.

Argument on Proposition of Law No. 6

The proposition suggested to the Court here is that of equitable estoppel. A good textual discussion of this principle may be found at 28 Am.Jur.2d, Para. 28, pp. 269, et seq. The United States Supreme Court has succinctly stated the rule in Morgan v. Chicago & A. R.R. Co., 96 U.S. 716, 24 L.Ed. 743, as follows:

> The appellee insists that the record discloses a case of estoppel in pais, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. Bk. v. Lee, 13 Pet., 107.
>
> He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. Merch. Bk. v. St. Bk., 10 Wall., 604, 19 L. ed., 1008.

See, also, Dickerson v. Colgrove, 100 U.S. 478, 25 L.Ed. 618, and Leather Manufacturers National Bank v. Morgan, 117 U.S. 96, 29 L.Ed. 811, 6 Sup.Ct. 657. In the latter

case the doctrine was extended to negligent conduct. In this case the report of the Special Master (Tr. 116-117) recites that the voluntary petition was presented to the Judge in the presence of the Referee in Bankruptcy and counsel for various parties including appellant herein. At that time there was an undertaking by counsel that the approval of the voluntary petition would be without prejudice to those claiming under the involuntary petition and that the voluntary petition was approved with this reservation by the Court. The report further recites that the ink was hardly dry on the order of approval when appellant filed its motion to dismiss the involuntary petition upon the ground that it had been made moot by the approval of the voluntary petition (Tr. 24). It is respectfully submitted that no party can rely upon this kind of conduct to prejudice the rights of those not in attendance and who had no opportunity to be heard.

SUMMARY OF ARGUMENT

The position which appellee advances may be briefly summarized as follows:

1. The Court is without jurisdiction to hear the appeal because appellant has failed to bring indispensable parties before this Court on appeal.

2. The approval of an involuntary petition is not conclusive and a creditor becomes a party to such approval by filing an answer under Sec. 137 of the Act and trying the issues under Sec. 144 of the Act. This argument is designed to dispel the assertion that the failure to appeal the order of approval of the involuntary petition prejudices anyone.

3. A creditor is no party to an approval of an involuntary petition pursuant to Sec. 142 of the Bankruptcy Act and cannot appeal until he has become a party by filing an answer pursuant to Sec. 137 and litigating the issue pursuant to Sec. 144.

4. A creditor is not a party to the approval of an involuntary petition pursuant to Sec. 143 of the Act and becomes a party by filing an answer pursuant to Sec. 137 of the Act and trying the issues pursuant to Sec. 144. Both this and the latter point are designed to show that the appeal herein is premature and that appellant has no standing to file this appeal.

5. An approval under Sec. 143 of the Act is not binding on a creditor unless the notice specified in Sec. 145 has been given. Such notice was not given in this case.

6. The filing of a later voluntary petition can have

no affect on the pendency of an earlier Chapter X petition.

7. Appellant has been guilty of either conduct or silence which estops appellant from asserting the approval of the voluntary petition as any prejudice to the rights of the petitioning creditors on the involuntary petition.

Respectfully submitted,

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I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 1967, I served three (3) copies of the foregoing Appellee's Brief upon counsel for the appellant, by mail, postage prepaid.

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